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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel

THEODORE J. ST. ANTOINE
736 Bowen Building
815 Fifteenth Street, N. W.
Washington 5, D. C.

THOMAS E. HARRIS
Associate General Counsel
815 Sixteenth Street, N. W.
Washington 6, D. C.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of the petition for certiorari, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General has been obtained. Counsel for General Motors Corporation has declined either to grant or refuse consent.[1]

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[1] The Solicitor General's letter and the correspondence between counsel for the AFL-CIO and counsel for General Motors Corporation has been filed with the Clerk.

In a letter dated August 13, 1962, counsel for General Motors stated:

"When and if a petition for certiorari is filed by the Solicitor General, we will be in a position, after having seen the same, to advise you as to whether we will consent to your possible filing of a brief *amicus curiae*. Obviously, we are in no

We are aware that motions of this sort "are not favored." (Rule 42.1). However, our inability to secure from counsel for respondent a timely and unequivocal answer to our request for consent, and the great importance to the AFL-CIO of the question this case presents, leaves us no alternative.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of national and international unions, including the United Automobile Workers which is the charging party in this case. The total membership of the unions affiliated with the AFL-CIO is approximately thirteen million.

The court below held that the agency shop is illegal under the National Labor Relations Act.

This ruling is of great importance to the unions comprising the AFL-CIO and their members because, as developed in the attached brief at pp. 4-9, approximately 6 percent of all collective bargaining agreements, covering several hundred thousand workers, contain agency shop provisions. These provisions were negotiated in reliance upon NLRB decisions dating back to 1950 sustaining the validity of the agency shop.

The ruling is likewise of great importance in that it impedes industrial peace by outlawing an intermediate form of union security which has played a useful role as a compromise solution in disputes over union security. As this motion goes to press the decision below is actually hampering settlement on the basis of the agency shop of

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position to grant consent at this time without having some idea as to what the position of the Solicitor General may be should he finally decide to file a petition for certiorari."

In reply counsel for the AFL-CIO endeavored to explain that the Rules and practice of the Court require that a brief *amicus* in support of a petition be filed at the same time as the petition. (Letter of August 17, 1962.) However, counsel for General Motors merely reiterated his position as quoted above. (Letter of August 20, 1962.)

disputes over union security between the United Automobile Workers, AFL-CIO, the International Association of Machinists, AFL-CIO, and employers in the aerospace industry.[2] Approximately 100,000 workers are involved, and the disputes are of such importance to national security that the President has appointed a special Commission to handle them. While these particular disputes will no doubt be finally disposed of prior to any ruling by this court on the legality of the agency shop, the disruptive effect the decision below has had upon these negotiations may be expected to recur in other disputes.

ISSUES NOT COVERED IN THE PETITION

The attached brief *amicus* in support of the petition for certiorari deals fully with two subjects which, we believe, will be covered only summarily in the government's petition for certiorari. On one of these points our interest, and our evaluation of the legal issues, differs substantially, we believe, from those of the government.

1. The pragmatic importance of the agency shop from the standpoint of the prevalence of agency shop provisions and the utility of the agency shop as a compromise solution of industrial disputes are fully developed in the attached brief. We expect that these matters will be dealt with much more summarily in the government's petition. The data set forth in the attached brief on pp. 7-8 were secured by our research department from affiliated unions, and will not be included in the government's petition.

2. As developed at pp. 19-22 of the attached brief, one of the problems raised by the holding below, that the agency shop is invalid as a matter of federal law, is the interrelationship between that decision and state court decisions upholding the power of the States to ban the agency shop

[2] See brief, pp. 10-11.

under § 14(b) of the National Labor Relations Act. One of these state court decisions, *Schermerhorn* v. *Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), is before the Court on petition for certiorari, No. 368, this Term. While we recognize that there is a conflict in principle between the decision below and the rationale of these state court decisions, we think that it is arguable (see brief pp. 21-22) that both the court below and the state courts are in error, and that while the agency shop is valid under the federal Act the States are not authorized to ban it by § 14(b). We therefore urge (brief p. 22) that, in view of the interrelationship between the issues presented in this case and in *Schermerhorn*, and of their difficulty and importance, the Court consider the petitions in the two cases together, and that it grant both.

The government, on the other hand, is concerned only, or at least primarily, with the validity of the agency shop as a matter of federal law, and we therefore anticipate that its petition will develop much less fully than we do in the attached brief the relationship between this case and the *Schermerhorn* case, No. 368.

Respectfully submitted,

J. Albert Woll
General Counsel
Theodore J. St. Antoine
736 Bowen Building
815 15th Street, N.W.
Washington 5, D. C.

Thomas E. Harris
Associate General Counsel
815 16th Street, N.W.
Washington 6, D. C.

September 6, 1962

IN THE

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OCTOBER TERM, 1962

NO.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the Motion for Leave to File a Brief as Amicus Curiae.

STATUTES INVOLVED

The statutory provisions involved are Section 8(a)(3), 8(a)(5), 8(b)(2) and 14(b) of the National Labor Relations Act, as amended. These provisions are:

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retraining membership."

"LIMITATIONS.

"Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that an agency shop is illegal under the National Labor Relations Act. This ruling casts doubt upon the validity of numerous agreements negotiated over the years in reliance upon established NLRB doctrine; and it jeopardizes the status of a form of union security which has played a useful role as a compromise solution for disputes over union security. The decision below is likewise important from the standpoint of the administration of justice in that it overturns, without reason or reasoning, a long-standing and sensible administrative interpretation of the Act in favor of a newly-improvised and practically undesirable interpretation. Finally, the decision below conflicts in principle with *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, 47 LRRM 2782 (1961), *cert. denied sub nom. Local 498, Teamsters Union* v. *Hig-*

gins, 368 U.S. 829, and *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), pending on petition for certiorari, No. 368, this Term.

1. The Board upheld the legality of the agency shop in *Public Service Company of Colorado*, 89 NLRB 418 (1950), decided under the Wagner Act, and in *American Seating Company*, 98 NLRB 800 (1952), decided under the Taft-Hartley Act. Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses. The report states (p. 25):

> "Before the enactment of the Labor Management Relations Act, 1947, unions frequently demanded the closed shop which required union membership prior to hiring. Since Section 8(a)(3) of that Statute's amendments to the National Labor Relations Act outlawed the closed shop in usual circumstances so far as businesses subject to the NLRA are concerned, unions now often demand either the union shop or maintenance of membership, and sometimes demand an agency shop, *all of which are permissible in restricted form under the amended National Labor Relations Act.* (Emphasis added.)[3]

In a footnote the report cites the Board's decisions in *American Seating Company* and *Public Service Company of Colorado*.

In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A study made by the United States Department of Labor, Bureau of Labor Statistics, of union security provisions in major collective bargaining agreements (i.e., those governing more than 1,000 employees) during the

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[3] Federal Mediation Service, The Agency Shop (1959).

years 1958-59 disclosed agency shop clauses in the following agreements:

Company and location	*Union*	*Number of employees*
Modified union shop and agency shop		
Kelly-Springfield Company Cumberland, Maryland	Rubber Workers	1,750
American Seating Company Grand Rapids, Michigan	Auto Workers	1,200
The Bunker Hill Company Kellogg, Idaho	Mine, Mill and Smelter Workers (Ind.)	2,000
Membership maintenance and agency shop		
Hershey Chocolate Corp. Hershey, Pennsylvania	American Bakery and Confectionery Workers (AFL-CIO)	3,000
Campbell Soup Company Chicago, Illinois	Retail, Wholesale	3,450
Corn Products Refining Company Illinois, Missouri and Texas (consistent with Federal and State laws)	Oil, Chemical and Atomic	4,400
Wisconsin Motor Corp. Milwaukee, Wisconsin	Auto Workers	1,450

Company and location	*Union*	*Number of employees*
American Cable and Radio Corp. New York-Washington, D. C. San Francisco-Honolulu	Communications Workers of America	1,350
Western Union Telegraph Co. (Interstate)	Commercial Telegraphers	30,000
Ohio Edison Co. Akron, Ohio	Utility Workers (6 locals)	1,550
Public Service Company of Colo. Denver, Colorado	International Brotherhood of Electrical Workers	1,800
Sole bargaining and agency shop		
Utah Power and Light Co. Utah, Idaho, and Wyoming	International Brotherhood of Electrical Workers	1,350
Dayton Power and Light Company Dayton, Ohio	Utility Workers	1,850
Government Services, Inc. Washington, D. C. (cafeteria agreement)	United Cafeteria and Restaurant Workers (Ind.)	1,500
Pacific Maritime Association	International Longeshoremen's and Warehousmen's Union (Ind.)	15,000

A survey by the Bureau of National Affairs of 400 representative contracts in effect as of mid-1960 disclosed that "agency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957." (46 LRRM 14, 18.)

It is probable that a current survey would reveal a continuing increase in the use of agency shop clauses, particularly in Indiana since the *Meade Electric Company* decision.[4] Counsel has made inquiry of several unions, with the following results:

(1) The United Steelworkers of America, AFL-CIO, reported that it has outstanding 164 collective bargaining agreements containing agency shop clauses. These clauses, applicable only in States having right-to-work laws, cover a total of 111,198 employees. Seventy-seven of these contracts, covering 34,146 employees, cover only plants in Indiana. In addition another 43,294 employees in Indiana are covered by agency shop clauses in company-wide agreements. Thus a total of 77,740 employees in Indiana are covered by agency shop clauses negotiated by the Steelworkers Union.

(2) The International Brotherhood of Electrical Workers, AFL-CIO surveyed only collective bargaining contracts covering units in Indiana and Florida. It reported that the following agreements contain agency shop clauses:

Company and location	*Number of employees*
Anaconda Wire & Cable (Marion, Ind.)	700
Arwin Industry (Columbus, Ind.)	900
Avco Corp. (Richmond, Ind.)	1,200

[4] *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959) held that the Indiana right-to-work law does not ban the agency shop.

Company and location	*Union*	*Number of employees*
Columbus Process Co. (Columbus, Ind.)		400
Delta Switchboard (Marion, Ind.)		200
Essex Wire (Marion, Ind.)		1,100
Wagner Industry (So. Bend-Wabash, Ind.)		about 200 to 300
National Record Press Co. (Richmond, Ind.)		400
International Resisters (St. Petersburg, Fla.)		400

(3) The International Union of Electrical, Radio and Machine Workers, AFL-CIO, surveyed only collective bargaining contracts covering units in Indiana. It reported that the following agreements contain agency shop clauses:

Company and location	*Number of employees*
Franklin Manufacturing Co., Brookville	125
National Metal Products Co., Connersville	275
Rex Manufacturing Co., Connersville	1,750
International Tel. & Tel., Fort Wayne	200
Mid-West Machine Co., Auburn	20
Lock Joint Tube Co., South Bend	40

(4) The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, reports that it has currently in effect 14 contracts containing agency shop clauses. Twelve of these, covering approximately 7,900 employees, are in Indiana, one covering 300 employees is in Iowa, and one covering 125 employees is in Nebraska.

While these data are admittedly fragmentary, it seems evident that agency shop clauses have become increasingly prevalent, and particularly in Indiana.

The decision below casts doubt on the validity of all of these agency shop clauses.

Their invalidation would have serious consequences for unions, employees, and employers. Unions and employers would be jointly and severally liable for the payment of back pay to any employees who had been discharged under these agency shop clauses, and, more important, for the restitution of agency shop fees—probably of *all* agency shop fees.[5] Also, under the Board's familiar *Hager Hinge* doctrine[6] contracts containing agency shop provisions would no longer bar an election on petition of a rival union. Even the prompt amendment of a contract to eliminate features held unlawful does not save the contract as an election bar. *McLeod* v. *Local 476, Industrial Workers*, 288 F. 2d 198 (2d Cir. 1961).

These consequences are all the more unjustifiable because they are unnecessary, resulting as they do from a tortured construction of the statute. But before examining the issue of statutory construction, we wish to call the Court's attention to another unstabilizing consequenc of the decision below.

2. The agency shop has served over the years as a useful compromise solution for disputes over union security. This role is jeopardized by the decision below.

Employers who have taken the position that they were unwilling, as a matter of principle, to enter into an agree-

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[5] During the period 1956-1961 the NLRB followed the policy of ordering the restitution of all dues and fees paid under a union security clause subsequently held to be illegal. This doctrine, first laid down in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956) was rejected by this Court in *Local 60, Carpenters Union* v. *NLRB*, 365 U.S. 651 (1961). However, under the criteria there laid down by this Court, an argument could be made for reimbursement of all agency shop fees, assuming the agency shop to be illegal, on the theory that employees who chose the option of paying fees, rather than that of joining the union and paying dues, probably would not have paid the fees voluntarily.

[6] *Hager & Sons Hinge Mfg. Co.*, 80 NLRB 163 (1948).

ment requiring employees to join a union which they might object to joining, have sometimes been willing to compromise upon an agency shop, which requires employees to contribute to the financial support of the union, but gives them the option whether to join. Many of the agency shop clauses enumerated *supra* in all probability originated as compromise solutions of such disputes.

A very recent compromise settlement of this sort is the agreement entered into on July 23, 1962 between Douglas Aircraft Company, Inc., and the United Automobile Workers (UAW), AFL-CIO, and the International Association of Machinists (IAM), AFL-CIO. The aircraft manufacturers had over the years resisted any sort of union security arrangement, but as part of the July 23 settlement Douglas Aircraft agreed to an agency shop. However, a suit has been filed in federal district court in Los Angeles challenging the legality of this agency shop provision, on the basis of the decision below in the present case.[7] Further, the uncertainty as to the legality of the agency shop created by the decision below is currently hampering the settlements of disputes between the UAW and IAM and other employers in the aerospace industry on the basis of the Douglas agency shop formula.[8] As long as the decision below stands

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[7] Bureau of National Affairs, Daily Labor Report, No. 162, August 20, 1962, p. A-3.

[8] John Herling's Labor Letter of August 4, 1962, states:

"*AGENCY SHOP AND AEROSPACE:* The labor-management battle in the aerospace industry employing more than 100,000 workers revolves around the issue of the agency shop, a form of union security which falls short of the union shop.

"This key issue of increased, though limited, union security confronts the newly appointed Presidential Commission, headed by Dr. George W. Taylor, veteran arbitrator of the University of Pennsylvania, Charles C. Killingsworth of Michigan State and Ralph Seward of Washington.

"Alone among the large manufacturing industries, the air-

it may as a practical matter inhibit use of the agency shop compromise, even though it is without binding effect outside of the Sixth Circuit.

The agency shop compromise has sometimes, according to Fortune Magazine, even served the interests of management. Fortune states:

> "In some cases the agency shop served a special management purpose. For several years before 1952, Western Union had a union-shop provision in its contracts covering 30,000 employees. In that year there was a bitter strike during which some union members crossed the picket line and returned to work. Fearing that these people would be expelled from the union as a result and therefore lose their jobs, Western Union refused to accede again to the union shop and compromised instead on an agency shop."[9]

The agency shop has also sometimes been used by unions to meet the objections of persons who refuse on religious grounds to join unions, and here too the compromise role

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craft manufacturers have over the years resisted the incorporation of the union shop in their contracts. A few weeks ago, however, one major company—Douglas Aircraft—did break the industry line and signed a contract with the two unions, which included an 'agency shop' for the first time.

"It is quite clear that most of the economic issues could be settled without too much difficulty along the Douglas pattern. But the unions insist that they had compromised on the economic issues with Douglas to achieve this union security breakthrough in the aircraft industry.

• • •

"A few weeks ago, the Court of Appeals in Indiana rejected the NLRB's reasoning and ordered the 'agency shop' ruling set aside. At once, this seemed to have triggered a new campaign by the National Right to Work Committee in California to stiffen the aerospace companies opposition to an 'agency shop.'"

[9] The Agency Shop, Fortune Magazine, January 1961, p. 176.

of the agency shop has been constructive.[10] Plainly, it serves no useful purpose to require, as does the decision below, that unions must either (1) insist that religious objectors actually join the union, on pain of discharge for refusal, or (2) forego insisting that religious objectors pay their share of the unions' costs.

Sensible solutions to the union security issue are difficult enough to arrive at without outlawing one—the agency shop—that has proved valuable in the past.

3. Only the clearest statutory language and legislative history would justify (i) overruling the long-standing Board decisions upholding the agency shop under both the Wagner and Taft-Hartley Acts, (ii) invalidating the large number of existing agency shop agreements, and (iii) depriving both management and labor of this compromise solution to disputes over union security. Far from there being any such language and history, every indication of congressional intent supports the validity of the agency shop as a reasonable means of resolving management-labor conflicts in this area.

Section 8(a)(3) of the National Labor Relations Act expressly permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *." The question thus presented is whether this statutory language permits an employer and a union to enter into an agreement providing that employees who do not choose to

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[10] E.g., the contract between Local 135, UAW, and American Seating Company, Grand Rapids, Michigan, provides for a union shop except that objectors on religious grounds must pay a monthly fee in the same amount as the dues into the local union welfare fund.

become members of the union shall have the option of making support money payments equal to initiation fees and dues as a condition of their continued employment. We submit that requiring membership or payments equivalent to those paid by members meets the literal terms of § 8(a)(3)'s authorization to require membership as a condition of employment. However, whether or not an option of "membership or equivalent payments" is so precisely identical with a requirement of "membership" alone as to meet the literal terms of § 8(a)(3), it is clear that such an option of membership or equivalent payments falls within the plain intendment of the statutory language.

For, obviously, § 8(a)(3) does no more than to set the outer limit of what a collective bargaining agreement may provide in the way of union security. Under § 8(a)(3) a collective bargaining agreement may require membership of all employees on or after the thirtieth day; it may not require membership before employment, at employment, or at any time prior to the thirtieth day. Simply put, a collective bargaining agreement may not require *more* in the way of union security than membership of all employees at a stated time: nothing in the Act forbids requiring *less* in the way of union security than such membership.

Indeed, it will hardly be denied that § 8(a)(3) does permit something less in the way of union security than requiring membership by all employees on or after the thirtieth day. No one would suggest, for example, that a provision requiring membership on or after the fortieth day, instead of the thirtieth, would be invalid. Again, General Motors Corporation, respondent at bar, had a maintenance of membership agreement with the United Automobile Workers for many years; and under that agreement employees other than those who were members at the time of the agreement or who voluntarily became members

thereafter were exempted from the membership requirement.

Since a collective bargaining agreement may thus provide something less than a requirement of membership on or after the thirtieth day for all employees covered by an agreement, it follows inexorably that § 8(a)(3) only provides an outer limit of union security and not the sole form of union security permissible. The agency shop—omitting as it does from the requirement of membership those who choose to make equivalent support money payments—falls squarely within that perimeter.

The court below hardly addressed itself to this problem. It simply pronounced its *ipse dixit* that an agency shop arrangement is "different" from a union shop and not something "lesser." But whether one calls the agency shop lesser or different from a union shop, the simple fact is that the agency shop does provide *greater choice* to the employee than does the union shop—it gives him the option of being a union member or not being a member, which the union shop does not. Since Congress deemed the union shop a permissible restriction on the employee's freedom of choice, there could be no conceivable reason for striking down an arrangement which gives the employee the additional choice of making equivalent payments without joining the union.

To interpret the Act as permitting the union shop and prohibiting the agency shop is "to infer Congressional idiosyncrasy." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 393. And, in this instance, it is all the more far-fetched to infer Congressional idiosyncrasy because the legislative history of the Act is clear that lesser forms of union security, including the agency shop, were intended to be permissible under § 8(a)(3).

Without detailing the legislative history, we do call it to the Court's attention that, with respect to both the Wag-

ner and Taft-Hartley Acts, Congress evidenced an intent that the union security provision merely mark out the outer limit of the permissible; and that in the case of the Taft-Hartley Act Congress explicitly intended to permit the agency shop. The Senate Committee Report on the Wagner Act expressly states that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but *leaves the way open to such agreements as might now legally be consummated* • • •." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11-12. (Emphasis supplied.) In the case of the Taft-Hartley Act, Senator Taft himself, in explaining § 8(a)(3), referred to the agency shop which had developed in Canada, under which, as Senator Taft put it, "If he pays the dues without joining the union, he has the right to be employed." 93 Cong. Rec. 4887, May 9, 1947. And, as also stated by Senator Taft during the debate: "• • • what we do, in effect, is to say that no one can get a free ride in such a shop. • • • The employee has to pay the union dues." 93 Cong. Rec. 3837, April 23, 1947. This Court summed up the legislative history in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41: "Thus Congress recognized the validity of unions' concern about 'free riders' • • •." The failure of the court below to take note of that Congressional concern with "free riders" led it to its irrational conclusion.

4. The decision below is even more incompatible with the overall scheme of § 8(a)(3) than it is with the literal language validating the union shop. For, while § 8(a)(3) permits employers and unions to enter into union shop agreements, the second proviso of § 8(a)(3) does not permit enforcement of such union shop agreements by discharge of nonmember employees who tender dues and initiation fees. In other words, while § 8(a)(3) permits a union shop clause to be written into a collective bargain-

ing agreement, it only permits discharge of those who do not pay dues and initiation fees, which amounts to the same thing as an agency shop. The decision of the court below thus accomplishes the incongrous result that a clause providing for a union shop which may only be enforced as an agency shop is legal, but a clause providing for an agency shop is illegal.

The actual operation of § 8(a)(3) is illustrated by the decisions of the Board in *Union Starch and Refining Co.*, 87 NLRB 779 (1949) and *Marlin Rockwell Corp.*, 114 NLRB 553 (1955). In *Union Starch* two employees who tendered dues and initiation fees, and who said they were willing to join the union and attend meetings, refused on religious grounds to take the oath of loyalty to the union, which was one of the conditions for union membership. The union invoked a union shop provision and obtained their discharge for non-membership. The Board, basing its decision on part (B) of the second proviso to § 8(a)(3), found both the union and the employer guilty of unfair labor practices, on the ground that the discharged employees had been denied union membership for reasons other than failure to tender dues and initiation fees, i.e., for refusing to take the union oath. The Board said (87 NLRB at 784):

> "Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop."

The Board's decision was approved and its order enforced by the circuit court; and certiorari was denied. *Union Starch and Refining Co.* v. *NLRB*, 186 F. 2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815.

This case was interpreted by the Board in *Marlin Rockwell* as holding that under a union shop contract an employee who tenders dues and initiation fees but refuses to

join the union cannot legally be discharged. The Board thus described its earlier decision (114 NLRB at 560):

> "The Board held, accordingly, that the mere refusal of the employees to join a union holding a valid union-shop contract, was not the kind of 'violation' of the union-shop contract which the union could lawfully enforce through discharge, or any other action affecting the employees' job security."

In *Marlin Rockwell* the Board held it an unfair labor practice for a union to invoke a maintenance of membership clause against employees who, while they continued to pay dues, had voluntarily resigned their union membership. The Board, following the reasoning of *Union Starch*, concluded that membership terminated by voluntary resignation was, in the language of proviso (B) of § 8(a)(3), "membership * * * terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees," and, therefore, not a permissible ground for discharge.

Thus the so-called union shop permitted by § 8(a)(3) is in practical effect enforceable only as an agency shop, since the union may not seek the discharge either of employees who resign from the union but continue to pay dues, or of employees who tender dues and initiation fees but refuse union membership.

The court below did not discuss these decisions, or any other decisions, or the effect of the second proviso to § 8 (a)(3). In its cursory denial of the Board's request for enforcement the court simply noted that § 8(a)(3) speaks in terms of "membership" "as a condition of employment" and declared that the "agency shop arrangement" is not the same thing. The court ignored the fact that while the first proviso to § 8(a)(3) speaks in union shop terms, i.e., "membership" "as a condition of employment," the

second proviso, and particularly part (B) thereof, imposes additional restrictions on the implementation of the union shop which equate the type of union security arrangement enforceable under the statute to an agency shop.

Since the Act permits a type of union security which is enforceable only as an agency shop, it is anomalous to hold, as did the court below, that an outright agency shop provision is illegal. It can hardly be the law that to be valid a union security provision must first provide for a union shop, using the language of the first proviso to § 8 (a)(3), and then limit it to, in effect, an agency shop, by incorporating the restrictions of the second proviso. The Act does not set forth a model union security provision for incorporation in contracts, and say that only it shall be valid, nor does it confer on the Board, or the court below, any power to devise and require the use of such a model provision. *Local 357, Teamsters Union* v. *NLRB*, 365 U.S. 667, 676-677.

The court below apparently also failed to comprehend the distinction between a union security provision under which employees are given the option of joining the union or paying the equivalent of initiation fee and dues while remaining outside of the union, and a provision which accords no option of joining. The court's opinion leaves the impression that the union was seeking an arrangement of the latter type.[11] But the decision of the Board unequivocally declares:

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[11] The court's opinion states:

"The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their

> "Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any nonmember employee who wishes to join. Everyone concedes that the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership."

The distinction, at best ignored by the court below, may well be crucial, for it would appear, and the union has never urged otherwise, that a provision requiring the payment of initiation fees and dues without an option of joining the union would indeed be invalid under the second proviso of § 8(a)(3), since membership would not be available "on the same terms and conditions" applicable to others. But where, as here, membership is available to all on equal terms, the option of non-membership can hardly result in invalidity.

5. Finally, the decision below conflicts in principle with the rationale of *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, 47 LRRM 2782 (1961), *cert. denied sub nom. Local 498, Teamsters Union* v. *Higgins*, 368 U.S. 829, and *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), pending on petition for certiorari, No. 368, this Term.

In the *Higgins* case the Supreme Court of Kansas met the contentions that the state right-to-work law did not ban the agency shop, that § 14(b) did not authorize a State to ban the agency shop, and that the jurisdiction of the

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initial employment, whichever is later a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an 'agency shop.'"

NLRB was exclusive, by pointing out that § 8(a)(3) permits the agency shop, and, in substance *only* the agency shop. The court declared (47 LRRM at 2787):

> "By virtue of the language in section 8(a)(3)(B) of the Taft-Hartley Act, heretofore quoted, it is apparent that the authority granted under this section is not primarily to compel membership in the union, but to permit the unions to *require* workers to pay dues and initiation fees to support the union."

The court further said (47 LRRM 2790):

> "But for the Kansas 'right-to-work' law the agency shop provision would presumably be a proper subject of negotiation in a collective bargaining agreement under the Taft-Hartley Act."

The Kansas court declared that since the agency shop, and, in substance, only the agency shop, is legal under § 8(a)(3), it follows that the state right-to-work law must have been intended to ban the agency shop, that Congress must have intended that § 14(b) enable States to ban the agency shop, and that the field is not preempted by the jurisdiction of the NLRB.[12] In the *Schermerhorn* case the Florida court did not analyze these issues as comprehensively or comprehendingly as had the Kansas court in *Higgins*, but it relied heavily upon the *Higgins* decision and upon this Court's denial of certiorari in that case.

The holding of the court below, that the execution of an agency shop agreement is an unfair labor practice under the federal Act, thus if correct, lends substantial support to the contention of the petitioner in *Schermerhorn* that the States do not have power under § 14(b) to ban agency shop agreements. If, on the other hand, the decision below is erroneous, as we contend, the support it gives to the argument of petitioner in *Schermerhorn*, that the

[12] Unlike the court below, the Kansas court discussed in extenso the language of § 8(a)(3) and the Board decisions construing it.

States may not ban the agency shop, disappears. On that assumption, however—i.e., that the agency shop is valid as a matter of federal law—the basic question presented by *Schermerhorn* whether the States have power under § 14(b) to ban the agency shop, is one of major importance.[13]

For it does not follow that if the decision below is erroneous the decisions of the state courts in *Higgins* and *Schermerhorn* are necessarily correct on that point. The Kansas court held, and the Florida court followed its ruling, that since the agency shop is embraced within the compass of § 8(a)(3)'s permission for union security arrangements, the agency shop should similarly be embraced within the compass of § 14(b)'s authorization for state prohibitions of union security arrangements. However, that is a *non sequitur*.

In § 8(a)(3) Congress uses the term "membership" as a "condition of employment" in delimiting the maximum form of union security *permissible* as a matter of federal law. Hence the Labor Board has correctly included lesser forms within the boundaries of what was permissible. On the other hand, in § 14(b) the language "agreements requiring membership in a labor organization as a condition of employment" is used by Congress to delimit the maximum reach of prohibitory state legislation. In view of this congressional purpose, it would seem that the States are not empowered by § 14(b) to invalidate union security arrangements which do not go so far as to require membership.

An illustration will make this plain. If a state government were to set a maximum *permissible* rural speed limit

[13] If, as the court below held, the agency shop is invalid under the federal Act, it is academic whether the States may ban it under § 14(b). Conversely, the question of state power is one of major importance if the decision below is incorrect.

of 50 miles an hour, this would obviously include permission for a driver to go at the lesser speed of 35 miles an hour. But if the state were to delegate to a county the authority to *prohibit* rural speeds of 50 miles an hour, this would just as obviously *not* include the authority to prohibit a driver from going at the lesser speed of 35 miles. Similarly, under § 8(a)(3), federal permission for the union shop includes permission for anything less; but under § 14(b), state prohibitions on membership requirements may *not* include prohibitions on anything less.

In view of the close though complex interrelationship between the issues presented in this case and in *Schermerhorn*, and of their difficulty and importance, we respectfully suggest that the Court consider the petitions in the two cases together, and we urge that it grant both.

CONCLUSION

We respectfully urge that the question of the legality of the agency shop is of such importance, the decision below so inadequate, and its results so mischievous, as to warrant review by this Court. It is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO

Theodore J. St. Antoine
736 Bowen Building
815 15th Street, N. W.
Washington 5, D. C.

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 16th Street, N.W.
Washington 6, D. C.

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